IN THE

Supreme Court of the United States

October Term, 1948.

No. 143.

143

ALVIN KRULEWITCH,

Petitioner.

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petitioner's Brief on Certiorari to the United States Court of Appeals for the Second Circuit With Appendix Attached.

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Statement.

On October 11, 1948, this Court granted a writ of certiorari directed to the United States Court of Appeals for the Second Circuit, to review a judgment of that Court entered on May 11, 1948, affirming a judgment of the District Court to the United States for the Southern District of New York, entered therein on April 25, 1947, convicting petitioner of a violation of 18 U. S. Code, Secs. 398, 399 and 88, after trial before Hon. James P. Leamy, District Judge, and a jury (R. 16; numerical references herein, unless otherwise indicated, relate to pages of the transcript of record). In granting certiorari, this Court limited the review to the third question presented by the original petition. That question arose upon petitioner's con-

tention that it was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator made without the knowledge or consent of petitioner after the termination of the alleged conspiracy and not in furtherance thereof. Other matters were presented by the petition, but in view of the limitation of the scope of the appeal they will, of course, not be argued herein.

Opinions Below.

The opinion of the Circuit Court of Appeals herein, which is annexed to the certified transcript of record (857-867), is reported in 167 F. 2d 943. The opinion on a prior appeal in the same case appears in 145 F. 2d 76. No opinion was rendered by the District Court, except the opinion condemning the unlawful search and seizure and granting petitioner's motion to suppress (105-106).

Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Judicial Code, Sec. 240 (a), as amended, also known as 28 U. S. Code Sec. 347.

Statutes Involved.

The statutes involved are Title 18, Sections 398 and 399, United States Code, and Title 18, Section 88, United States Code. They read as follows:

Title 18, Section 398, U. S. Code

Section 398. WHITE-SLAVE TRAFFIC; TRANSPORTATION OF WOMAN OR GIRL FOR IMMORAL PURPOSES, OR PROCURING TICKET. Any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce, or in any Territory or in the District of Columbia, any woman

or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; or who shall knowingly procure or obtain, or cause to be procured or obtained, or aid or assist in procuring or obtaining, any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, or in any Territory or the District of Columbia, in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent or purpose on the part of such person to induce, entice, or compel her to give herself up to the practice of prostitution, or to give herself up to debauchery, or any other immoral practice, whereby any such woman or girl shall be transported in interstate or foreign commerce, or in any Territory or the District of Columbia, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $5,000, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, Section 2, 36 Stat. 825.)

Title 18, Section 399—U. S. Code

(Re; White Slave Traffic)

399. Same; inducing transportation for immoral purposes.—Any person who shall knowingly persuade, induce, entice, or coerce, or cause to be persuaded, induced, enticed, or coerced, or aid or assist in persuading, inducing enticing or coercing any woman or girl to go from one place to another in interstate or foreign commerce, or in any Territory

or the District of Columbia, for the purpose of prostitution or debauchery, or for any other immoral purpose; or with the intent and purpose on the part of such person that such woman or girl shall engage in the practice of prostitution or debauchery, or any other immoral practice, whether with or without her consent, and who shall thereby knowingly cause or aid or assist in causing such woman or girl to go and to be carried or transported as a passenger upon the line or route of any common carrier or carriers in interstate or foreign commerce, or any Territory or the District of Columbia, shall be deemed guilty of a felony and on conviction thereof shall be punished by a fine of not more than $5,000, or by imprisonment for a term not exceeding five years or by both such fine and imprisonment, in the discretion of the court. (June 25, 1910, c. 395, Sec. 3, 36 Stat. 825.)

Title 18, Section 88—U. S. Code

88. (Criminal Code, Section 37.) Conspiring to Commit Offense Against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Section 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Section 37, 35 Stat. 1096.)"

Statement of Matters Involved.

The indictment (11-16) charges in three counts that petitioner (who will occasionally be referred to herein as

the defendant), together with one Rose Sookerman, a co-defendant (not tried herein): firstly, persuaded and induced one Elizabeth Mary Johnston to go from New York City to Miami, Florida, on October 20th, 1941, for the purpose of prostitution; secondly, on the same date transported or caused her to be transported from New York City to Miami, Florida, for that purpose; and thirdly, commencing September 15th, 1941, conspired with the co-defendant to commit those offenses. Three overt acts are claimed, occurring October 1st, 15th and 20th, 1941.

Defendant was arrested on December 6, 1941, and was released in bail conditioned upon his appearance to answer the charge in Florida. Upon the adjournment of the United States Grand Jury for the Southern District of Florida in February, 1942, the United States Attorney for that district issued a certificate that there would be no prosecution against defendant, his appearance bond was released and cancelled and the matter was terminated so far as any prosecution in Florida was concerned (80-86).

On January 4th, 1943, defendant was indicted in New York on the same charge (3). The case was tried four times. The first trial was had before Clancy, *D.J.*, and a jury from July 7th, 1943, to July 13th, 1943, and resulted in a disagreement (2). The second trial was had before Porterie, *D.J.*, and a jury from August 25th, 1943, to September 1st, 1943, and resulted in a conviction (2), which, however, was reversed by the Circuit Court of Appeals on August 1st, 1944, with an opinion by Learned Hand, Circ. J. (2), reported in 145 F. 2d 76. The third trial was had before Moskowitz, *D.J.*, and a jury on February 18th and 19th, 1946, and resulted in a mistrial (2). The fourth trial, occurring from April 9th to 25th, 1947, resulted in the conviction affirmed in 167 F. 2d 943, with respect to which the present certiorari was granted.

During the last trial the District Court conducted an inquiry on defendant's application to suppress evidence illegally seized. This hearing was held in the absence of

the jury and resulted in the granting of defendant's motion (9, 105-106, 225-227).

The jury made a recommendation of leniency (762) after specific instructions by the Court on that subject (761-762).

Defendant was sentenced to two years' imprisonment, to be followed by two years' probation (767).

Upon the imposition of sentence the District Judge stated that "there are some questions," and forthwith admitted defendant to bail pending appeal (767).

The notice of appeal was duly filed on April 30th, 1947 (10); and supplemental notice of appeal from an order denying motion for request to remand was filed on December 6th, 1947 (11). Judgment of affirmance was rendered on May 11th, 1948, in an opinion by Chase, Circ. J. On or about June 9th, 1948, the Circuit Court of Appeals granted a stay pending the filing of the petition for certiorari, and on the same day Mr. Justice Jackson signed an order extending the time of petitioner to file his petition for certiorari to and including July 10th, 1948 (869). That petition was duly filed, and granted to the extent indicated.

Statement of the Case.

It does not appear necessary to extend this brief unduly by a protracted review of the facts. The case against defendant rests almost in its entirety on the testimony of Elizabeth Johnston, also variously known as Elizabeth Mary Sorrentino, Joyce Winters, Joyce Winston, Mrs. Curtis and otherwise (47). The substance of her testimony, viewed in the light most favorable to the Government, was tersely outlined in the opinion of the Circuit Court of Appeals on the first appeal (145 F. 2d 76).

All of the testimony given by her, to the extent that it incriminated defendant, was flatly denied by him (585), an individual who has been in a reputable and substantial advertising business for many years (512-518). The Circuit

Court of Appeals in the same opinion made the following comment upon her testimony and credibility:

> "She was undoubtedly an unruly and extremely unstable person, she had been wayward from the outset of her career, and had early served a term in a reformatory * * * a hysterical woman, probably never well balanced emotionally, and in any event enervated by a life from girlhood of carousing and debauch * * * her ungoverned moods and caprices * * * *Joyce herself was shown to be to the last degree untrustworthy.*" (Italics ours.)

The purpose of these comments by Learned Hand, Circ. J., was to show that it was error on the trial then being reviewed to withhold from defendant for use on cross-examination a certain signed statement of the witness at variance with her testimony. The Court thus described it:

> "Joyce had been questioned at her home by an agent of the Federal Bureau of Investigation on December 8, 1941, thirteen months before the indictment was filed; she signed a written statement of five pages which the agent took away with him, and which completely exculpated the accused, saying that she and Sookerman had gone to Miami of their own choice, to 'work' there on their own account; that the accused had nothing whatever to do with their going, although he had gone down later and had seen them; and that the witness had never had any illicit relations with him."

As to this contradictory statement alone the Court observed:

> "* * * We surely cannot say that this circumstantial story so totally at variance with her testimony, might not have created enough doubt to turn the scales in favor of the accused."

If she had already been "shown to be to the last degree untrustworthy", we can fairly urge that this formal declaration, actually used on the last trial, operated well-nigh conclusively to deprive her testimony of any trace of credibility, and that the conviction was necessarily chargeable at least in part to the serious error about to be argued.

That the same witness did not make a better showing on the last trial appears from the following observations in the opinion of Chase, Circ. J. (861):

> "It had already been shown that she had been a prostitute since her teens. She had admitted on cross-examination that she was living at the time of the trial in an illicit relationship and had been doing so for about eleven months. She had readily stated that she had previously lied about this very case in a sworn statement to an F.B.I. agent. She had conceded that she had attempted to blackmail the appellant and that she had been arrested upon several occasions and spent time in at least three reformatories."

We reiterate that the conviction sought to be reviewed rests almost exclusively upon the testimony of this unsavory witness.

Specification of Error to Be Urged.

In view of the limitation of the present review, the single point to be argued herein is as follows:

It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator made without the knowledge or consent of petitioner after the termination of the alleged conspiracy and not in furtherance thereof.

ARGUMENT.

POINT I.

It was prejudicial and reversible error for the trial Court to receive in evidence, over objection, important alleged declarations of a coconspirator made without the knowledge or consent of petitioner after the termination of the alleged conspiracy and not in furtherance thereof.

In order to simplify the references to those portions of the record bearing most directly on the subject matter of the single legal question presented, we have taken the liberty of appending to this brief the several pertinent extracts from the record, including that portion of the opening statement bearing on the evidence, the testimony itself and the paragraph from the opinion of the Circuit Court of Appeals dealing with the point involved.

The indictment specifies September 15th, 1941, as the date of the inception of the conspiracy, and alleges that it was part of the conspiracy that certain acts were to be performed in or about the month of October, 1941 (13-14). Three specific overt acts are alleged, with the dates involved being October 1st, 15th and 20th, 1941 (15). The complaining witness was arrested early in December, 1941 (109), by an agent of the Federal Bureau of Investigation at Canandaigua, N. Y., where on December 8, 1941, she signed a statement exonerating defendant (824). A few days later she was taken from Canandaigua to Rochester, N. Y., for a week (110), where she was visited by her mother and by the codefendant, one Rose Sookerman. At the time of this visit both the defendant and the codefendant were also already under arrest (575).

It is therefore quite evident that any theretofore existing conspiracy was at an end, for defendant and codefendant were certainly not conspiring to entice or transport the complainant after both alleged offenders and the alleged victim had been arrested. It follows that statements

of the codefendant made at this time could in no sense be viewed as being in furtherance of the conspiracy.

It must be remembered that the codefendant was not on trial, so that there was no need to offer her statements as being incriminatory of herself. The Government never offered any proof, nor did it contend, that defendant authorized or even knew of the statements made by her.

The commission of the error now relied upon was foreshadowed in the opening statement of the United States Attorney. Brief as that statement was, this very conversation was detailed at length (34-35), although even at that stage of the proceedings defendant unsuccessfully objected to all references thereto, duly noting an exception.

Finally, when the complaining witness was asked to state a conversation had between her and Miss Sookerman and not in defendant's presence, defendant immediately objected. The Government took the position (110) that the conversation was an act in furtherance of the conspiracy. Defendant, on the other hand, contended (110-111) that the alleged conspiracy ended with the transportation and that the statement was not binding on defendant.

Nevertheless, the trial Court overruled the objection and permitted the complaining witness to give the following testimony (111-112), aggravating the damage by indicating to the jury that the alleged declaration of Miss Sookerman constituted evidence of defendant's intent even though it was not in furtherance of any conspiracy (111).

> "She asked me, she says, 'You didn't talk yet?' And I says, 'No.' And she says, 'Well, don't' she says, 'until we get you a lawyer.' And then she says, 'Be very careful what you say.' And I can't put it in exact words. But she said, 'It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it.'"

In short, the complaining witness was allowed to state that the codefendant, after the termination of the conspir-

acy, fastened upon defendant a plain imputation of guilt. The Court was promptly apprised that this supposed declaration was a post-arrest matter and not in furtherance of the conspiracy, but proceeded on the theory that a declaration of a coconspirator, whenever made, could be accepted as evidence of intent (111). We have been unable to discover any authority for such a proposition.

We reiterate that the Government offered no proof whatsoever that defendant authorized or had even the slightest knowledge of the statement in question.

In *Fiswick* v. *United States*, 329 U. S. 211, 91 L. Ed. 196, this Court had under consideration the admissibility of statements made by a coconspirator after the termination of the conspiracy. A conviction of conspiracy to defraud the United States in the exercise of its governmental functions by violating the Alien Restriction Act of 1940 was reversed, solely on the ground that the trial Court erred in receiving against appellants testimony as to statements made by a coconspirator after the termination of the conspiracy. The general rule was thus stated in the opinion of Mr. Justice Douglas:

> "While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, *Pinkerton* v. *United States*, 328 U. S. 640, 646, 647, 90 L. Ed. 1489, 1495, 1496, 66 S. Ct. 1180, and cases cited, all such responsibility is at an end when the conspiracy ends. *Logan* v. *United States*, 144 U. S. 263, 309, 36 L. Ed. 429, 445, 12 S. Ct. 617; *Brown* v. *United States*, 150 U. S. 93, 98, 37 L. Ed. 1010, 1013, 14 S. Ct. 37. Moreover, confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise. It is rather a frustration of it. If, as the Circuit Court of Appeals thought, the maintenance of the

> plot to deceive the government was the objective of this conspiracy, the admissions made to the officers ended it. So far as each conspirator who confessed was concerned, the plot was then terminated. He thereupon ceased to act in the role of a conspirator. His admissions were therefore not admissible against his erstwhile fellow-conspirators. *Gambino* v. *United States* (C. C. A. 3d Pa. 108 F. 2d 140, 142, 143."

In the same opinion the Court adopted the time of the last overt act as the line of demarcation fixing the end of the conspiracy, saying:

> "The overt acts averred and proved may thus mark the duration, as well as the scope, of the conspiracy.
>
> * * * * *
>
> "If, as we think, the conspiracy charged and proved did not extend beyond the date of the last overt act, the admissions of each petitioner were improperly employed against the others."

While the Circuit Court of Appeals herein cited, *inter alia*, the *Fiswick* decision, it ruled it to be inapplicable—notwithstanding the plain effect of the holding to be that, although the result of a conspiracy may continue, it does not thereby become a continuing conspiracy; that confession after apprehension is not in furtherance of the enterprise but rather a frustration thereof; and that even though it be part of the conspiracy to deceive the Government, admissions made have the effect of ending it and are not admissible against *quondam* fellow-conspirators. The suggestion of the Circuit Court of Appeals that there is implicit in a conspiracy to violate the law an ancillary agreement by the conspirators *inter se* to conceal the vio-

lation tends to introduce into the law on this subject an illogical appendage that may well nullify the basic rule of exclusion. It was in this connection that the Circuit Court of Appeals recognized that the Fifth Circuit had held directly to the contrary in *Briggs v. United States*, 17 F. 2d 741.

In the Government's brief in opposition to the petition for certiorari herein, a further attempted distinction of the *Fiswick* case was introduced on the basis that the Sookerman statements were made to the complaining witness herein and not to a government agent; ergo they were calculated to conceal the existence of the conspiracy from the prosecuting authorities. We are aware of no decision predicated upon any such refinement of reasoning. Were this principle to be generally adopted, it would be fraught with possibilities of abuse. The opportunities for evading the general doctrine rendering the declarations inadmissible could be so simply circumvented as to make it completely ineffective.

An examination of the authorities in the various circuit courts shows that for more than 40 years it has been universally held that evidence of the type attacked herein is inadmissible in criminal prosecutions. We shall proceed briefly to examine several illustrative cases.

The Second Circuit itself has quite frequently condemned such proof. Thus, in *Feder v. U. S.* (C. C. A. 2d, 1919) 257 F. 694, Hough, Circ. J., wrote:

> "This conspiracy had come to an end, and when that occurred, 'whether by success or by failure, the admissions of one conspirator by way of narrative of past facts are not admissible in evidence against the others.'"

Similarly, in the leading case of *Van Riper v. United States* (C. C. A. 2d, 1926) 13 F. 2d 961, L. Hand, Circ. J., wrote:

"Merely narrative declarations are not competent."

Again, in *United States v. Lonardo* (C. C. A. 2d, 1933) 67 F. 2d 883, in reversing a conviction, L. Hand wrote:

> "The statements of Hatlen and Gates were admitted against him over his objection; the prosecution's theory being that the concerted purpose of the confederates had not yet been completely fulfilled, and that the declarations of one were admissible against the rest until it was. We need not pause to consider whether in fact the common purpose had ended, because it would make no difference if it had not. Declarations of a confederate made after his arrest will not, except in most unusual cases, be in furtherance of the common plan."

In *United States* v. *Groves* (C. C. A. 2d, 1941) 122 F. 2d 87, a narrative statement of a coconspirator made after the termination of the conspiracy was held to have been improperly admitted, and necessitated a reversal of the conviction.

Also, in *United States* v. *Goodman* (C. C. A. 2d, 1942) 129 F. 2d 1009, it was held that the statements of an alleged coconspirator, to be admissible against others than the declarant, must not only be made while the conspiracy is pending, but must also be in furtherance of the object of the conspiracy, and mere narrative declarations are excluded. Swan, Circ. J., wrote:

> "Einhorn's statements that Goodman had been his partner in the bankrupt's business were not made to procure goods or money for his corporation. They were merely narrative declarations of a past fact. We are unable to imagine any way in which they could have furthered the objects of a

> conspiracy to conceal assets, transfer assets or falsify books. Nor does the Government's brief suggest any or attempt to answer the appellant's argument on this point. * * * We conclude that it was error to admit such statements as against the appellant, and we cannot say that this evidence was non-prejudicial."

The rule is the same in the Third Circuit, where, in *Gambino* v. *United States* (C. C. A. 3, 1939) 108 F. 2d 140, Maris, Circ. J., wrote, in reversing a conviction:

> "It, therefore, follows that assertions made by an accomplice after the termination of the conspiracy come within the prohibition of the hearsay rule and are inadmissible."

This ruling was expressly approved by the Supreme Court in the *Fiswick* case, *supra.*

Likewise, the Fourth Circuit in *Hauger* v. *United States* (C. C. A. 4, 1909) 173 F. 54, reversed a conviction because the declarations and confessions of an alleged co-conspirator after the offense had been committed and the parties had been arrested were held to be inadmissible against the accused. Boyd, Circ. J., quoted from *Queen* v. *Hepburn*, 11 U. S. 290, 3 L. Ed. 348, and added:

> "So strictly have the courts guarded and applied the rule that hearsay has been held incompetent even in aid of human freedom."

Again in *Dowdy* v. *United States* (C. C. A. 4, 1931) 46 F. 2d. 417, the Court held statements of a codefendant after arrest, not in defendant's presence, inadmissible and reversible error since they were obviously after the termination of the conspiracy and not in furtherance thereof.

The rule is the same in the Fifth Circuit, for in *Hogg* v. *United States* (C. C. A. 5, 1931) 53 F. 2d 967, Bryan,

Circ. J., ruled that reference by a coconspirator to defendant as his boss, made after the termination of the conspiracy, was inadmissible against defendant, "because at that time the conspiracy had been broken up, and the statement attributed to Johnson was nothing but hearsay."

In *Bryan* v. *United States* (C. C. A. 5, 1927) 17 F. 2d 741, it was held that the admission of testimony of a witness that on the morning after defendant's arrest she was visited by a third person, and of the conversation between them, which tended to show that the visitor was attempting to conceal evidence against defendant, in the absence of any evidence that defendant authorized or had knowledge of such visit, was prejudicial error. Bryan, Circ. J., wrote:

> "The Government seeks to sustain the ruling on the theory that Ison, though not indicted, was a conspirator, and consequently his declarations and conduct were binding on the other conspirators. But there is no evidence that the conspiracy continued beyond the time of the seizure, and it is well settled that the declarations and conduct of a conspirator are binding only upon himself after the conspiracy has been abandoned or broken up."

The Court further held that the testimony was not harmless because merely cumulative; nor could the admission be justified on the theory of an attempt by defendant to conceal evidence of his guilt. The judgment of conviction was reversed on this ground alone. This is the decision which the Circuit Court in the case at bar explicitly recognized as having reached a conclusion diametrically opposed to that which was the result herein.

Another important decision in the same circuit is *Clark* v. *United States* (C. C. A. 5, 1932) 61 F. 2d 409. There a conviction was reversed, the Court saying:

"As the statements were made by Thomas in August, it is possible that the conspiracy had been abandoned. At any rate, they were merely a narrative of past events. And clearly they were not made by Thomas in furtherance of the conspiracy, and were not made part of the *res gestae* of any overt act. It would be extending the rule to unreasonable limits to permit these statements made by a coconspirator, not on trial, to be admitted. Considering the conflicting evidence before the jury, we cannot say that the testimony, improperly admitted, was harmless. These errors require a reversal of the judgment."

The same Court quoted with approval from Underhill on Criminal Evidence, Section 493:

"But those declarations only are admissible which are made by a conspirator during the existence of the conspiracy and in furtherance of it. The statements of a conspirator, made after the conspiracy has ceased to exist, either by success or failure, and which are merely narrative of past events (though in form a confession, *i. e.*, an admission of the conspiracy) are not receivable against a fellow-conspirator unless the latter was present when they were made and heard them, and expressly or by implication acquiesced in them."

Similarly, in *Seeman* v. *United States* (C. C. A. 5, 1936) 90 F. 2d 88, Foster, Circ. J., wrote:

"But declarations of a co-conspirator made after the conspiracy has terminated, by success or failure, are not admissible against any other person than himself unless that person was present when they were made."

The same rule was followed in *Nibbelink* v. *United States* (C. C. A. 6, 1933) 66 F. 2d 178, where a conviction was reversed and Moorman, Circ. J., wrote:

> "Before the declarations of coconspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made."

The rule was likewise applied in the Seventh Circuit in *Collenger* v. *United States* (C. C. A. 7, 1931) 50 F. 2d 345, where the conviction was reversed, Alfschuler, Circ. J., writing:

> "It is too plain for discussion that this statement to the Government agent, far from furthering the conspiracy, was made after the conspiracy had ended, and with the purpose of exposing it and penalizing the conspirators, and was hearsay as to all the defendants except Orta * * * Where there are many defendants on trial charged with a general conspiracy, each is subject to the hazard of being injuriously affected by alleged acts or statements of some other defendants, incompetent as to all but the ones making the statements. In such situations courts should be ever alert to minimize, so far as possible, the hazard to defendants whom the law does not bind by such statements."

The rule in the Eighth Circuit has been applied to a variety of situations. Thus, in *Sorenson* v. *United States* (C. C. A. 8, 1906) 143 F. 820, Sanborn, Circ. J., wrote:

> "Where two or more defendants are jointly tried for the same offense, or for a conspiracy to commit

> it, the declaration of no one of them, made in the absence of another after the completion of the offense, is competent evidence against the latter."

In *Fain* v. *United States* (C. C. A. 8, 1913) 209 F. 525, it was held that, while the act of one conspirator in the prosecution of the enterprise was, after proof of the conspiracy, competent evidence against all, his admissions in his narration of past events after the conspiracy had come to an end, whether by success or failure, were inadmissible against his fellows. The evidence was accordingly held incompetent against the appellant, and the judgment of conviction was reversed.

In *Heard* v. *United States* (C. C. A. 8, 1919) 255 F. 829, in reversing a conviction, Sanborn, Circ. J., wrote:

> "While, in cases of conspiracy, the act of one conspirator in the prosecution of the enterprise for the purpose of attaining its object is evidence against all, the act, declaration, or admission of one conspirator by way of narrative of past facts after the conspiracy has come to an end, either by success or failure in attaining its object, is not admissible against the others."

Cf. *Gerson* v. *United States* (C. C. A. 8, 1928) 25 F. 2d 49, where the same rule was applied to acts committed prior to the formation of the conspiracy.

The rule in the Ninth Circuit is identical, for in *Tofanelli* v. *United States* (C. C. A. 9, 1938) 28 F. 2d 580, Rudkin, Circ. J., wrote:

> "The test whether the statement or declaration of one conspirator is admissible against the others does not depend entirely upon whether the statement was made during the existence of the conspir-

acy. The statement or declaration must not only have been made during the continuance of the conspiracy but it must likewise have been made in furtherance of its object."

A discussion of the authorities is contained in *Mayola v. United States* (C. C. A. 9, 1934) 71 F. 2d 65, where the Court quotes with approval from the earlier holding in the same circuit in *Sugarman* v. *United States* (C. C. A. 9) 35 F. 2d 663, where it was held:

> "The true rule is that acts and declarations of one conspirator, in furtherance of the object of the conspiracy and during its existence, are binding on all members of the conspiracy, whether present or absent."

In the same opinion the rule of *Kelton* v. *United States* (C. C. A. 3) 294 F. 491, in the following language, was quoted with approval:

> "Before the declarations of coconspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made."

Finally, there is the Tenth Circuit, where in *Minner* v. *United States* (C. C. A. 10, 1932) 57 F. 2d 506, Phillips, Circ. J., wrote:

> "The acts or declarations of a conspirator prior to the formation of the conspiracy or after its termination are not admissible against his coconspirators."

Likewise, in *Holt v. United States* (C. C. A. 10, 1937) 94 F. 2d 90, in reversing a conviction, Phillips, Circ. J., wrote:

> "Alexander was a coconspirator and the acts and declarations of a coconspirator during and in furtherance of the conspiracy are admissible against his coconspirator. But the statement made by Alexander tended to defeat rather than further the conspiracy. It was a narration of past events,—a confession of Alexander who was not on trial, and was clearly inadmissible for any purpose."

It is thus plainly established that wherever the question has arisen, the several Circuit Courts of Appeals have come to the same conclusion, namely, that, in order to render declarations of coconspirators admissible against an alleged conspirator who was on trial, the declarations must fulfill the two requirements that they be made during the pendency of the conspiracy and with a view towards promoting its success. The testimony we challenge herein could not possibly have furthered a conspiracy which had already terminated from two standpoints: firstly, the alleged objects of the conspiracy had already been attained and consummated; secondly, both of the alleged conspirators and the witness testifying to the supposed conversation were already under arrest. We advert again to the Circuit Court of Appeals' intimation that the conspiracy continued for the purpose of concealing the role of petitioner as a conspirator. This is not tenable herein, inasmuch as prior to the alleged statement the witness had already signed a statement completely exculpating petitioner (824), nor is such a rule workable in general, for almost any species of declaration could by distortion of reasoning be viewed as part of a plan to evade detection. We submit that the testimony under attack cannot possibly be jus-

tified logically or reasonably as an act tending to advance the alleged conspiracy, but that on the contrary it was insinuated into the case solely for the purpose of prejudicing petitioner through an indirect, hearsay intimation of his guilt. A conviction thus procured should not be permitted to stand.

POINT II.

Under the circumstances disclosed, the error complained of is not one that may be ignored.

We anticipate that the Government will argue that the admission of the testimony in question was harmless and therefore not such error as to necessitate a reversal of the judgment. The determination of this aspect of the case entails a study of the matters thoroughly discussed in *Kotteakos* v. *United States*, 328 U. S. 750, 90 L. Ed. 1557, wherein this Court so completely treated the rationale and applicability of the harmless error rule as to render further analysis on our part presumptuous. The conclusion reached therein is summed up in the following language of Mr. Justice Rutledge:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Another statement of the applicable law is set forth in *Ah Fook Chang* v. *United States*, 91 F. 2d 805:

> "Finally, if the record shows error, but does not disclose whether the error is prejudicial or whether it is not prejudicial, it is presumed to be prejudicial and to require reversal."

Wholly apart from the foregoing principles, we submit that there are several cogent reasons why the error we urge must be deemed prejudicial. They are briefly as follows:

1. A scrutiny of the entire record discloses that the case against petitioner was a weak one, predicated virtually in its entirety on the impeached and contradictory testimony of a single disreputable witness, who had a compelling motive to inflict injury on petitioner.

2. The case was tried four times, and one of the trials resulted in a disagreement of the jury, a circumstance which is universally recognized as being indicative of a real doubt as to petitioner's guilt.

3. The prosecutor stressed and expressly outlined this particular evidence in his brief opening, which shows that he attached considerable importance to it. We urge the familiar argument that the Government should not be permitted to use and rely strongly on incompetent evidence to procure a conviction and subsequently, when the error is assailed, seek to minimize its significance.

4. The United States Attorney in Florida, with prompt and full knowledge of the events in issue, discontinued all proceedings and declined to prosecute petitioner for this alleged offense or any other.

5. The jury's recommendation of mercy herein after some deliberation is itself a sign that it had grave qualms about rendering any verdict of conviction.

6. The previous conviction herein was reversed by the Circuit Court of Appeals on grounds much less substantial, showing that that Court recognized the case to be eminently one in which the result could be affected by evidence which in a less close litigation could be disregarded.

7. Even on the appeal from the present conviction, the Circuit Court of Appeals, while swift to term another error "a harmless irregularity" (866), did not see fit to dispose of the present point on any such basis.

In short, wholly apart from the general principles referred to in the cases cited above, the instant situation discloses special and persuasive reasons why it cannot be made to turn on a supposition of harmless error. The issues herein were litigated so closely that a far less material deviation from proper procedure could have influenced the outcome. Particularly in view of the almost standard practice of Circuit Courts of Appeals to reverse convictions for this very error alone, we submit that the error herein requires a reversal.

CONCLUSION.

The judgment appealed from should be reversed.

Respectfully submitted,

JACOB W. FRIEDMAN,
Attorney for Petitioner.

APPENDIX.

Extract From Opening Statement by Mr. Hilly.

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Folio 101

Now, Johnston stayed in her home for a period of three or four days, when she was arrested by a special agent of the Federal Bureau of Investigation. She was transferred to a jail in Rochester, New York, and remained there for a period of about a week. During that time she was visited by her mother and by Sookerman who had returned from Miami, Florida. At that time Sookerman told her that——

Mr. Todarelli: Your Honor, I object to this. It is plainly hearsay, and I do not think it is proper for Mr. Hilly to tell the jury anything about a conversation between Sookerman and this party Johnston.

Folio 102

Mr. Hilly: If your Honor please, I will approach the bench on that question.

The Court: Very well. Please come up.

(Discussion at the bench off the record, not in the hearing of the jury.)

The Court: The jury will understand that anything that is said by counsel in an opening statement is not evidence at all. It is simply counsel's idea of what the evidence will be. You are not to be guided in any way by the opening statement of counsel. You are to be guided only by the evidence itself as it comes in.

Folio 103

Mr. Todarelli: Will your Honor rule on my objection?

The Court: Your objection is overruled.

Mr. Todarelli: I respectfully except.

Mr. Hilly: At this time Sookerman and Johnston had a conversation, this is in Rochester, New York, and at that time Sookerman told Johnston that they should take the blame for the transportation to Miami, Florida, from New York City, that Krulewitch was an old man and that he couldn't do time. Ultimately Johnston was taken to Jacksonville, Florida, and at that time she was bailed out. She did not put up the money for her bail bond, that was put up by Sookerman and Krulewitch.

Extract From Testimony of E. Sorrentino, for Government, Direct.

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Folio 327

Q. Now, subsequently were you arrested; after you left New York City were you arrested? A. Yes, I was.

Q. How long after you left New York City were you arrested? A. Well, a couple of days later I think.

Q. Where were you arrested? A. Up at my mother's.

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Folio 328

Q. Where were you taken? A. Right in my home town.

Q. From your home town were you taken anywhere? A. Yes. To Rochester.

Q. Who arrested you, Mrs. Sorrentino? A. An agent by the name of Frost.

Q. And by an agent you mean an FBI agent; is that correct? A. Yes.

Q. Did you remain in Rochester for any period of time? A. A week.

Q. During that time did you have any visitors? A. Yes.

Folio 329

Q. Who visited you? A. Betty and my mother.

Q. Now at that time, at the time Betty visited you, did you have a conversation with her? A. Yes.

Q. Will you tell us what that conversation was?

Mr. Todarelli: I object to this, your Honor.

The Court: Was the defendant present?

Mr. Hilly: No, he was not.

The Court: Then how is it admissible?

Mr. Hilly: On this ground, if your Honor please. One of the counts in the indictment charges a conspiracy by this defendant here and by the defendant Sookerman who is presently not on trial.

Folio 330

The Court: Is Betty Spookerman?

Mr. Todarelli: Yes, your Honor.

The Court: Betty is Sookerman?

Mr. Todarelli: Yes.

Mr. Hilly: And this is an act in furtherance of the conspiracy, this conversation, and consequently the Government argues that the act of one conspirator binds the other.

Mr. Todarelli: May I suggest this, your Honor, that if the conspiracy is valid it terminated when the act violated in the conspiracy terminated.

Page 111
Folio 331

This, therefore, is a conversation that took place after the conspiracy had ended; and anything that was said by Betty is binding only upon Betty and not binding upon the defendant. It is just like a confession, for example, where a man is arrested, he is charged with conspiracy and he confesses to the District Attorney. The courts have uniformly held

that that confession is binding only upon him because the conspiracy had ended.

Folio 332

The Court: Isn't any act or declaration of the defendant or a co-conspirator either before or after the act, evidence of intent?

Mr. Todarelli: No, sir. I don't mean to be impertinent at all, your Honor——

The Court: I have just carefully read Judge O'Connor's charge to the jury in the *Chaplin* case. He so charged, and it was the law.

Mr. Todarelli: This was after the arrest, your Honor.

Folio 333

The Court: I understand.

Mr. Todarelli: It was not in furtherance of the conspiracy.

The Court: I understand. The objection is overruled. The question may be answered.

Mr. Hilly: Mr. Reporter, would you be good enough to reread the question to the witness, please.

(Record read.)

A. She asked me, she says, "You didn't talk yet?" And I says, "No."

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Folio 334

And she says, "Well, don't," she says, "until we get you a lewyer." And then she says, "Be very careful what you say." And I can't put it in exact words. But she said, "It would be better for us two girls to take the blame than Kay because he couldn't stand it, he couldn't stand to take it."

Mr. Todarelli: Now, your Honor, I move that that be stricken out on the ground that it is quite apparent that that conversation was not in furtherance of any conspiracy to transport in interstate commerce.

Folio 335

The Court: Motion overruled.

Mr. Todarelli: I have one further request, your Honor. May we have that date approximately fixed?

The Court: If the witness can fix it.

Q. Can you fix the date of that conversation? A. What?

Q. Can you fix the time, Mrs. Sorrentino, of that conversation with Kay—with Betty Sookerman? A. Well, no. I know it was after Pearl Harbor that conversation was.

Q. Did that conversation occur during the week that you were in Rochester, New York? A. Yes.

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Folio 336

Q. I show you this and ask you if this is your signature? A. Yes.

Q. Pardon? A. Yes.

Q. And I ask you to look at these papers here and I ask you if this is a statement that you made to a special agent of the Federal Bureau of Investigation? A. Yes.

Q. And that statement is dated on December 8, 1941, is that correct, and that is the date you made the statement? A. Yes.

Mr. Hilly: I offer it in evidence.

Mr. Todarelli: No objection.

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Folio 337

The Court: It may be received and marked as an exhibit.

(Government's Exhibit 5 for identification received in evidence.)

Mr. Hilly: With your Honor's permission I would like to read this statement to the jury.

The Court: You may.

Mr. Todarelli: Excuse me. May I see Mr. Hilly just a minute?

(Mr. Todarelli conversed with Mr. Hilly off the record.)

Folio 338

Mr. Hilly: I am reading now, ladies and gentlemen of the jury, from Government's Exhibit 5. It is dated December 8, 1941 (reads Government's Exhibit 5 to the jury).

Q. Now this statement, Mrs. Sorrentino, that you gave to Special Agent Frost on December 8, 1941, was that statement correct?

Mr. Todarelli: I object to that, your Honor.

A. No.

The Court: On what ground?

Mr. Todarelli: On the ground that you can't impeach your own witness.

Folio 339

Mr. Hilly: I am not attempting to impeach my own witness, your Honor.

Mr. Todarelli: The question sounds like it to me, was it correct?

The Court: I will permit the question.

Q. Was that statement correct? A. No.

Q. You made that statement after your conversation with Betty? A. No, I didn't; I made it on my own.

Q. You made that statement on your own? A. Yes.

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Folio 340

Mr. Pinto: I did not get that. That was private between you and the witness.

Mr. Hilly: I did not intend it to be private.

The Witness: I made that statement on my own.

Mr. Pinto: I did not get it. Might we hear it?

Mr. Hilly: Will you read the answer, please, Mr. Reporter, so that Judge Pinto and Mr. Todarelli can hear it.

(Answer read.)

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Folio 578

CROSS-EXAMINATION

The Witness: As soon as I was taken in custody I was taken to the Post Office, and Mr. Frost sat down, and I said all this to him, and as soon as it was finished, this was probably maybe an hour later, maybe less than that, I don't know, and I signed it.

Q. You called him Frost. The fact is it is Trost, isn't it, T-r-o-s-t? A. I don't know. I said Frost.

Q. I am not arguing with you about it. He asked you a lot of questions before he started to write these things out; am I right? A. Yes, that is true.

Folio 579

Q. You didn't write this, did you, except to sign it? A. No. I just signed it.

Q. Mr. Trost wrote it out; is that right? A. Yes, sir.

Q. And that was done after he had questioned you for some time? A. Yes.

Q. Where were you arrested, by the way; at your mother's home? A. Yes, I was.

Q. By Mr. Trost himself? A. No. He had another man with him.

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Folio 580

Q. And the two of them took you down to the Post Office? A. Yes.

Q. Is that right? A. Yes.

Q. Now, between the time that they picked you up at your home and the time that you read and signed this statement, had you been in communication with anybody at all? A. No.

Q. All right. You didn't see Mr. Kay, certainly, did you? A. No, did not.

Q. You didn't see any lawyer? A. No.

Q. You didn't see any friend? A. No.

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Folio 581

Q. When you left to go back to Canandaigua for the holidays you hadn't discussed with Mr. Kay the possibility of your being arrested on this charge, had you? A. When what?

Q. You hadn't talked about being arrested on any charge like this, had you? A. No.

Q. All right. So that when you made this statement, Government's Exhibit 5, you were telling the truth, weren't

you? A. No, I wasn't. I just tried to save him, to save us all.

Folio 582

Q. Well, Kay didn't tell you to put any of the things in here that you put in, did he? A. No, he did not. I just——

Q. Betty hadn't talked with you, had she? A. No.

Q. The fact of the matter is that Betty came up to see you in jail after this was taken, isn't that right? A. Yes, that is right.

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Folio 583

Q. When you said that no threats or promises had been made to you and that you were making this statement of your own free will knowing that it could be used in court against you, that was true, wasn't it? A. What? That I had signed it? Yes, sure, I signed it.

Q. Mr. Trost didn't threaten you, did he? A. No.

Q. He asked you to tell the truth, didn't he? A. Well, yes.

Q. Didn't he insist upon your telling only the truth? A. I know. I am sorry I didn't.

Q. Didn't he? Did he not? A. Yes. Well, naturally, he asked me questions, and that is all. He says, "Do you swear this is the truth?", And I says, "Yes, I do."

Extract From Opinion of Circuit Court of Appeals.

Pages 862-863

"The evidence of the government supported its allegations that the witness just mentioned, Mrs. Sorrentino, was transported from New York to Florida by the appellant and that in so doing he acted in concert with Miss Sookerman, who had been indicted for that conspiracy, and

convicted on the previous trial. It appeared on this trial that Mrs. Sorrentino had been arrested in December, 1941 upon her return from Florida and taken to Rochester, N. Y., where she was visited by Miss Sookerman. The witness was then permitted over the appellant's objection to testify that the co-conspirator, after having asked the witness if she had talked yet and been told that she had not, said to her, "Well, don't until we get you a lawyer." And then continued, "Be very careful what you say," followed by "It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it." The objection was that the alleged conspiracy ended with the transportation and that this statement of the co-conspirator, having been made thereafter, consequently was not binding upon this appellant. See *Fiswick* v. *United States*, 329 U. S. 211, 217, 67 S. Ct. 224, 91 L. Ed. 196; *Galatas* v. *United States*, 8 Cir., 80 F. 2d 15, 23, 24, certiorari denied, 297 U. S. 711, 56 S. Ct. 574, 80 L. Ed. 998. But while it might conceivably be held that this evidence was admissible to show appellant's intent, we prefer to rest our decision on another ground. We think that implicit in a conspiracy to violate the law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated. Thus the conspiracy continues, at least for purposes of concealment, even after its primary aims have been accomplished. The statements of the co-conspirator here were made in an effort to protect the appellant by concealing his role in the conspiracy. Consequently, they fell within the implied agreement to conceal and were admissible as evidence against the appellant. Cf. *United States* v. *Goldstein*, 2 Cir., 135 F. 2d 359; *Murray* v. *United States*, 7 Cir., 10 F. 2d 409, certiorari denied, 271 U. S. 673, 46 S. Ct. 486, 70 L. Ed. 1144. While *Bryan* v. *United States*, 5 Cir., 17 F. 2d 741, is by implication directly to the contrary, we decline to follow it."